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I. Introduction

In the 150 years since the first lectures on contracts were given at The Dickinson School of Law, time has wrought change and growth both in the institution and in the field of contract law. It would seem appropriate in this sesquicentennial year to examine some of the changes in this legal discipline which, because of its logical cohesion, has made itself an ideal first-year subject through which to introduce the rigors of the legal method.

The effort early in the common law was to develop rules which would be applicable to different types of contracts in almost any situation. This differed somewhat from the civil law in which the emphasis tended to be on the type of contract involved, like transportation contracts as distinguished from real estate contracts or service contracts. In this century, the common law, influenced in part by statutory and administrative rules, has tended to distinguish between specific fields of contract expertise, particularly government contracting in which special technical rules govern bidding, the expenditure of funds and the settlement of disputes. Real estate transactions, the marriage contract and sale of goods have their own particular contract rules. Labor-management contracting is a special field, as is insurance law. Underlying these special fields, however, general contract principles and many particular rules still are universally relevant.

II. The "Codification" of Contract Law

The cases that dealt with all the facets of contract law plethora of in the eighteenth and nineteenth centuries caused research difficulties and uncertainty in the law. Even if the law in a particular area was found, its applicability was often unclear because many aspects of it were only partially developed. The numerous rules were

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never organized into any logical order. This absence of codification may seem unusual to continental lawyers who are accustomed to law organized into various codes which legislatures enacted rather than law which courts developed piecemeal. Nevertheless, four developments occurred in this century that significantly clarified and organized the many contractual rules.

A. The Restatement of Contracts (1932)

The First Restatement of the case law of contracts was published by the American Law Institute in 1932. By means of 609 rules, each with its own explanation and illustrations, the First Restatement sought to integrate the law of contracts. These rules were gathered mostly from the cases themselves. Although the Restatement was not adopted by a legislature and, therefore, was not binding on the courts, it nevertheless provided excellent guidance for the courts.[1] Not only did the drafters of the Restatement codify the case law but in several instances they sought to promulgate rules which they thought were desirable, even though the law had not yet developed to that extent. The following three examples illustrate this development of the law through the First Restatement.

1. Consideration as the basis for enforcing promises.—At common law, a contract is defined as a promise for the breach of which the law gives a remedy.[2] This definition immediately implies that there are promises for the breach of which the law does not give a remedy. These promises are not termed contracts.[3] Historically, the promises that were enforced in the early English common law were promises of three types: (1) written promises given under seal; (2) promises for which the promise incurred a detriment; and (3) promises on the basis of which the promises conferred a benefit on the promisor.

This third set of promises may be illustrated by the relationship between a creditor and a debtor. One person loans money on the basis of the other person's promise to repay it with interest. This promise is enforceable because a benefit has been conferred on the

1. This guidance was particularly noticeable in extending the reach of promissory estoppel, in the irrevocabilities of unilateral offers, in rights of defaulting plaintiffs and in intended third-party beneficiaries.

2. RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981); RESTATEMENT OF CONTRACTS § 1 (1932).

3. Promises for the breach of which the law does not give a remedy are illusory promises, promises induced by fraud or duress, promises of minors, illegal contracts, promises to marry in most jurisdictions, promises induced by certain types of mistake, promises the performance of which would be unconscionable, economically impractical, or impossible, and gratuitous promises, or promises given without consideration. The latter promise has encouraged the growth of promissory estoppel.

promisor. An example of the second category, a detriment incurred by the promise, would be the transportation of a horse by a ferryman across a river during which he injures the horse. Because of the ferryman's promise to transport the horse, the owner of the horse suffered a detriment in turning the horse over to him. In the last 200 years, the first set of promises, promises under seal, has fallen into disuse. The other two promises, however, still remain; detriment incurred by the promisee and benefit conferred by the promisee.

This rule of benefit conferred and detriment incurred formed the basis for the enforceability of promises. Moreover, it evolved into the present-day rule of "consideration"; a promise is not enforced unless "consideration" has been given for it.[4] Consideration in the last century came to mean "bargain." The benefit conferred or detriment incurred was bargained for and given by the promisee in exchange for the promise.[5] The promise or bargain therefore was enforceable. However, gratuitous promises were not enforceable, even if the promisee, on the basis of the gratuitous promise, later incurred a detriment.[6] In such circumstances, the detriment was not bargained for and given in exchange for the promise.

This same denial of enforceability was applicable to promises given out of gratitude for past services. For example, suppose an employee worked overtime without pay for an employer for a length of time. The employer then promises to pay him a bonus of a thousand dollars in gratitude for his service. It is impossible for the service to be bargained for and given in exchange for the promise when the service preceded the promise in time. Therefore, promises of this type could not be enforced.

In this century, the doctrine of consideration, or bargain, as the sole basis for the enforceability of a promise partially has been undermined by the concept of promissory estoppel in the First Restatement and by the contract modification rules of the Uniform Commercial Code and the Second Restatement.

Because the doctrine of consideration did not seem adequate in determining all the promises that should be enforced, the First Restatement set forth several examples of promises that should be enforced without consideration. These promises are gratuitous and, therefore, are not bargained for. The chief example is a promise upon which the promisee later relied to his detriment.[7] Thus, estop-

4. *See* Farnsworth, *The Past of Promise: An Historical Introduction to Contract*, 69 COLUM. L. REV. 576, 598 (1969).

5. "[B]argain is always an agreement for an exchange." 1 A. CORBIN, CORBIN ON CONTRACTS § 10, at 22 (1963).

6. *See* Kirksey v. Kirksey, 8 Ala. 131 (1845), implying that detriment incurred on the basis of a gratuitous promise was not a sufficient basis for the enforcement of the promise.

7. RESTATEMENT OF CONTRACTS § 90 (1932).

pel was introduced into all aspects of the law of contracts. Estoppel had its beginnings before 1932 in bailments, charitable subscriptions and family promises, but the adoption by the Restatement of a general principle of estoppel greatly expanded the type of promise that could be enforced without a bargain. If a gratuitous promise is made and the other party reasonably relies thereon, that promise may be enforced against a promisor who attempts to revoke it.[8] This reliance, however, had to be of a substantial nature and had to be incurred only by the promisee, not by a third party.[9]

2. *Third-party beneficiaries.*—Since the 1859 landmark New York case of *Lawrence v. Fox*,[10] the law dealing with third-party beneficiaries developed slowly. The First Restatement hastened this development.[11] The common law resisted the idea that a party who was not the promisee of a promise, but who benefited from it could later sue upon the promise. Both in England and in the United States, a third party was not privy to the contract and could have no contractual rights and obligations under it.[12] A common example is the situation in which the promisor promises another to pay a debt that the other owes to a third party, and fails to do so. Does the third party have a contract action for breach of promise against the promisor? The First Restatement set forth the rule that this third party does have such an action, whether he is a creditor of the promisee or a mere gratuitous donee of the promisee.[13]

The classification of third-party intended beneficiaries of a promise as either a creditor or a donee of the promisee resulted in different legal consequences for each. For example, if the promisee owed no duty to the third party for whom he solicited the promise, the third party's rights vested, and the promisor and promisee could not later amend their contract to the detriment of the third party.[14] These third-party donee-beneficiaries surprisingly could prevent such

8. *See* Ricketts v. Scothorn, 57 Neb. 51, 77 N.W. 365 (1898), holding that because the defendant's promise had the real or apparent intention of influencing the promisee to alter her position for the worse, and because the promisee did so in reliance on the promise, the promise was enforceable through estoppel. The court used promissory estoppel as an extension of the time honored doctrine of equitable estoppel.

9. *See* Alleghany Corp. v. James Found. of N.Y., 115 F. Supp. 282, 297 (S.D.N.Y. 1953), in which the court quoted *Restatement of Contracts* § 90, and stated as follows: "But, this was not a promise on the part of James, which one 'should reasonably expect to induce action or forbearance of a definite and substantial character' on the part of third parties, strangers to the agreement who never in fact saw it until after they had accepted the offer."

10. 20 N.Y. 268 (1859).

11. RESTATEMENT OF CONTRACTS §§ 133-47 (1932).

12. *See In re* Rotherham Alum. & Chemical Co., 25 Ch.D. 103, 111 (1983), in which the court stated that "an agreement between A & B that B shall pay C gives C no right of action against B. I cannot see that there is in such a case any difference between Equity and Common Law. It is a mere question of contract."

13. RESTATEMENT OF CONTRACTS § 133 (1932).

14. 2 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 396 (3d ed. 1957).

a later amendment, while a creditor-beneficiary could not unless he somehow relied detrimentally on the promise.[15] This lack of a vested right in the creditor-beneficiary existed because the creditor-beneficiary always had a cause of action against the promisee on the original debt. The donee-beneficiary had nowhere to go if the promisor and promisee later modified the agreement.

This illogical but rather sentimental distinction between the vested rights of creditor and donee-beneficiaries was abandoned fifty years later with the publication of the Second Restatement in 1981, which permitted the rights of either to be the creditor or the donee-beneficiary divested before they became aware of their rights under the contract.[16] The case law, however, that developed under the First Restatement, may not so easily abandon precedent.[17]

3. The doctrine of anticipatory breach.—The doctrine of anticipatory breach entered the common law in the middle of the nineteenth century in the famous case of *Hochster v. De La Tour.*[18] Most landmark English contract cases are factually very simple but theoretically very difficult, and *Hochster* is no exception. In *Hochster*, an employer was going to leave England for a tour of Europe and had employed the plaintiff to accompany him and to assist him during the tour. The tour was to start on the first of June. About May first, the employer contacted his employee-to-be and told him that he had changed his mind and was not going to Europe. The employee, shortly after receiving this notice, contracted with a new employer who was going to leave for the continent on July first. The employee then, before June first, sued his former employer for breach of contract. The question presented was whether it was possible for the employer to breach his promise to perform before June 1st. The court concluded that there were implied promises running from the time of the formation of the contract until its time of performance. Thus, this litigation was actually a timely suit setting forth a present breach of an implied promise rather than a suit complaining of a future breach. This reasoning has caused the law for anticipatory breach to be treated specially, like no other breach.

There are several differences between typical breaches and anticipatory breaches. First, the anticipatory breacher may cure his breach by a timely retraction before the time of performance, pro-

15. *Id.* § 397.

16. RESTATEMENT (SECOND) OF CONTRACTS § 311 (1981).

17. *See* Sears, Roebuck and Co. v. Jardel Co., 421 F.2d 1048 (3d Cir. 1970), in which the court declined to adopt the Second Restatement modification which was then in draft form and permitted the divesting of the rights of a third-party creditor beneficiary.

18. 2 E. & B. 678, 118 Eng. Rep. 922 (Q.B. 1853).

vided that the other party has not changed his position.[19] In *Hochster v. De La Tour* the victim of the breach had obtained new employment. Therefore, his original employer could not retract the breach. This is the only instance in which a breach not only can be mitigated but also cured.[20] The second difference involves the options available to the victim of the breach. In normal contracts the victim of a major breach may treat it as minor and may elect to remain in the contract. Many anticipatory breach cases have stated that the victim must treat the breach as major; which means that the contract will be at an end whether this result was intended or not.[21] The contract only can be revived by the breacher himself, by his timely retraction of the breach.[22] A third anomaly is that there can be no anticipatory breach if the victim has fully performed his part of the contract;[23] in such a case, the court will not find the implied promise not to breach anticipatorily the promise to perform.

This third rule is subject to much criticism.[24] The reason for the limiting rule, however, is that the implied promise found in *Hochster* is not there in fact; it is a legal fiction. To reach an equitable result the courts find this legal fiction useful when both promises are executory. There apparently is no reason to utilize this legal fiction after the victim has fully performed, for he no longer needs to have the right to change his position. Moreover, he expected that the other party would perform at a certain time. Certainly in *Hochster v. De La Tour*, in which the victim had not started to perform, it seems only just that when he hears that his employer is not going to perform the contract that the employee then should have the right to change his position and to seek his remedy. That necessity does not occur if the employee already has fully performed.

This doctrine of anticipatory breach has been restated in the

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19. 11 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1335 (3d ed. 1957).

20. RESTATEMENT OF CONTRACTS § 318 comment d (1932).

21. *See* G.E.J. Corp. v. Uranium Aire, Inc., 311 F.2d 749, 753 (9th Cir. 1963), in which the court stated, "Some courts follow the theory that the repudiation of a contract obligation, prior to the time fixed for performance, is no breach until acted upon by the promisee, while others adopt the view that it effects an immediate breach regardless of the response of the promisee."

22. RESTATEMENT OF CONTRACTS § 319 (1932).

23. *Id.* § 318 comment e.

24. *See* 4 A. CORBIN, CORBIN ON CONTRACTS § 962, at 865 (1951), in which Corbin states as follows:

> The reasons upon which [anticipatory repudiation] can actually be sustained are equally applicable to unilateral contracts. The harm caused to the plaintiff is equally great in either case; and its seems strange to deny to a plaintiff a remedy of this kind merely on the ground that he has already fully performed as his contract has required.

See also Pollack v. Pollack, 46 SW.2d 292, 293 (Tex. Civ. App. 1932), in which the court stated, "The doctrine which excepts contracts fully performed by one side from the general rule is purely arbitrary, and without foundation in any logical reason."

Restatement First[25] and carried through with slight modification in the Uniform Commercial Code[26] and the Restatement Second.[27] This doctrine is one of the most interesting aspects of contract law, because the usual rules do not work to their fullest, for the breach is actually a constructed breach; the promise being breached is not there in fact, but is implied only in law.

B. Twentieth Century Writers

Other influences on the codification and on the development of the law of contracts were the works of principally two writers. Samuel Williston wrote his treatise in the first quarter of this century.[28] Arthur Corbin wrote his treatise in the second quarter.[29] Jurists, the name given writers of this stature in the civil law, have never been as influential in the common law as they have been in the civil law. Yet, these two men brought together and critically examined the entire field of contract law. Their works are milestones in its development and clarification. Williston was more doctrinaire and clearer in the formulization of the rules he drew than was the later writer, Corbin. Corbin tended to be flexible and more general in many of the principles he saw at work. Researching Corbin's work is sometimes frustrating, for it lacks precision. In his time, his ideas were closer to what actually was taking place in the cases than Williston's earlier ideas had been.[30] Williston was very influential in the development of the First Restatement of the Law of Contracts. Fifty years later, Corbin left his mark on the Second Restatement.

C. Uniform Commercial Code (1958)

The third development, which took place in the 1950s and 1960s in the various states, is Article 2 of the Uniform Commercial Code concerning contracts for the sale of goods. Article 2 is indeed a "codification." It has, however, a saving clause which states that those areas not covered by the Code are covered by the common law.[31] The common law is too vast to be codified in all its details. Even the Restatement had made no effort to do so, although it is broader in scope than the Uniform Commercial Code.

Article 2 applies only to the sale of goods; therefore, it has no rules for the sale of real property, for the sale of services or for construction contracts. Yet Article 2 made advancements in certain ar-

25. RESTATEMENT OF CONTRACTS §§ 318-324 (1932).
26. UNIFORM COMMERCIAL CODE §§ 2-610, 2-611 (1958).
27. RESTATEMENT (SECOND) OF CONTRACTS §§ 250-254 (1981).
28. S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS (1920).
29. A. CORBIN, CORBIN ON CONTRACTS (1951).
30. *Review: Corbin on Contracts*, 61 YALE L. REV. 1092 (1952).
31. UNIFORM COMMERCIAL CODE § 1-103 (1958).

eas of contract law, as the Restatement earlier had done. These advancements can be observed in common law rules outside the sale of goods.[32]

1. Unconscionability.—For example, the Uniform Commercial Code introduced the concept of unconscionability, which means that the court will not enforce a term in a contract or the whole contract if it finds the term or the contract to be unconscionable.[33] The legislatures of the various states, when they enacted the Code, failed to provide the courts with adequate guidance to define unconscionability. There are, however, certain rules that have been developed which give some guidance to the courts as they begin to define unconscionability through constant application of the principle to specific fact situations.[34] The first rule requires, at the beginning, an inequality or an over-reaching in the bargaining process. For example, a sharp and astute individual versus a ignorant person would be considered an unequal bargaining situation. The second rule requires that this lack of bargaining power on the part of the weaker party result in a term that is grossly unfair.[35] Guidance was also available in equity rules which permitted the policing of bargains. These equity rules were developed long before the Restatement or the Uniform Commercial Code.[36] The courts always had policed bargains of minors, permitting the avoidance of the contract if the minor so wished.[37] Power of avoidance also was extended to mental incompetents and to those who were the victims of fraud or duress.[38]

The courts also used certain subterfuges in policing; they would find that a term, whose effect they disliked, was ambiguous or its meaning difficult to interpret, when it actually was not.[39] The courts did not want to enforce the provision, but they felt constrained from making bold assertions that such terms cannot be inserted into contracts, absent legislative authorization. In the common law, a deep-seated commitment to freedom of contract exists which allows the

32. *See* 1 R. ANDERSON, ANDERSON ON THE UNIFORM COMMERCIAL CODE §§ 1-101: 16-24 (3d ed. 1981).

33. UNIFORM COMMERCIAL CODE § 2-302 (1958).

34. Braucher, *The Unconscionable Contract or Term*, 31 U. PITT. L. REV. 337 (1970).

35. *See* Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965), in which the court stated, "Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." *See also* Jones v. Star Credit Corp., 50 Misc.2d 189, 298 N.Y.S.2d 264 (Sup. Ct. 1969).

36. *See generally* Annot., 18 A.L.R.3d 1305 (1968).

37. Keifer v. Fred Howe Motors, Inc., 39 Wis.2d 20, 158 N.W.2d 288 (1968).

38. MacFarlane v. Peters, 103 Cal. App.3d 627, 163 Cal. Rptr. 655 (1980), in which the court held that although acts may be legal in and of themselves, if they are done with fraudulent or oppressive intent, then equity will intervene.

39. Cases are collected in Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943).

individual, through contract, to determine his place in society and to use his initiative to benefit himself and society. Freedom to contract was but a part of a free society. This freedom allowed people to create their own rights and obligations and to dispose of property through will or contract,[40] rather than derive these obligations and rights from class or family status. The concept of unconscionability actually will police that freedom and, to an extent, save competent adults from their own folly.

Under the rubric of unconscionability, courts can use direct methods of policing the terms of a contract rather than indirect methods of language construction, or seeming inability to read what is actually there in print. The problem with unconscionability, however, as one court has stated, is that "concededly, deciding the issue is substantially easier than explaining it."[41] If a court is going to police directly various terms, what guidelines will it use?

Apparently, what is developing under the law of unconscionability is essentially a return to the rules of the equity courts of early England. In the English law, as every common lawyer knows, there were two principal courts: the law courts and the equity courts. The equity courts had special remedies for contract breach. For example, they could force a person to perform his promise. The law courts, however, could only award damages in the form of money to the person injured by the breach of the promise. When an individual went into equity and asked for specific performance of the contract, equity courts took the position that it was within their discretion to determine whether to grant specific performance or to withhold it and, as a result, send the person back to the law side and have him enforce the breach by money damages. In the exercise of this discretion they examined the contract and withheld their remedy if they thought: (1) that the contract consideration was grossly inadequate, or if other terms were unfair; (2) if its enforcement would cause an unreasonable or disproportionate hardship to the individual against whom it is enforced; or (3) if this promise was induced by a sharp practice or some kind of a mistake or misrepresentation that did not amount to fraud or mistake of such nature that would require the rescission of the entire contract.[42] These same general principles, long used by the courts of equity, are now making their way into the law side of the court under the term "unconscionability."

2. *Acceptance which varies the terms of the offer.*—Another

40. *H. Maine, Ancient Law*, 163-65 (10th ed. 1918).

41. Jones v. Star Credit Corp., 50 Misc. 2d 189, 298 N.Y.S.2d 264 (Sup. Ct. 1969) (dealing with the sale of a freezer to a couple on welfare for an inflated price).

42. RESTATEMENT OF CONTRACTS § 367 (1932).

development in the law of contracts introduced by the Uniform Commercial Code is that of the effectiveness of an acceptance which varies the offer. In the common law of offer and acceptance as developed by the courts, the offeror is in charge of the contract terms; he makes an offer—which is always a promise—"I will promise to pay you $5000 if you paint my office building during the month of July a color of white." The offeree has right to say "yes" or "no" when he hears this offer. If he says something in between, like "I cannot do it in July, but I will do it in September," he has not accepted the offer. The acceptance must mirror the offer. If it varies in any detail, it is not an acceptance, but a rejection and is itself a new offer.[43]The Uniform Commercial Code permits an offeree to vary the terms of an offer if he has indicated a desire to contract.[44] He then has formed a contract, and his varied terms, if minor, will become part of the contract unless specifically objected to by the original offeror. If his varied terms are major, they will not become a part of the contract unless assented to by the original offeror.[45] The purpose of this provision is to provide for the enforcement of a contract when the buyer makes his offer, usually in writing on a form, and sends it to the seller, and the seller sends back his acceptance on his own form which varies in some detail the offer, and the parties then begin to do business with each other as if they have a contract. Under the common law, if a contract existed at all, it was under the terms of the seller's form;[46] that is, the party who sent the last form controlled the terms of the contract.

The problem generated by this flexibility in contract formation introduced by the Uniform Commercial Code is that the oferee may find himself in a contract not of his choosing, with major varied terms, which he appeared to be insisting upon at the time of contract, still outside the contract, vainly waiting for the offeror to accept them. If the terms are onerous to the offeror, the offeror never will accept them. The only way the offeree can protect himself is to make it clear when he accepts that his acceptance is expressly conditional on the offeror accepting his new terms.[47]

This new method of contract formation has caused much litigation and has not been adopted in full by the drafters of the Uniform Law on the Formation of Contracts for the International Sale of

43. RESTATEMENT OF CONTRACTS §§ 59, 60 (1932).

44. UNIFORM COMMERCIAL CODE § 2-207 (1958).

45. *Id.* comment 3.

46. *See* 2 R. ANDERSON, ANDERSON ON THE UNIFORM COMMERCIAL CODE § 2-207:4 (3d ed. 1981).

47. *See* Lipman, *On Winning the Battle of the Forms: An Analysis of Section 2-207 of the U.C.C.*, 24 BUS. LAW 789, 803 (1969).

Goods,[48] by our common law neighbor, Canada,[49] by the International Convention on the Law of Treaties[50] or by the Second Restatement.[51]

D. Restatement Second of Contracts (1981)

By 1981, half a century had passed since the publication of the First Restatement of Contracts. The Restatement Second was published to reflect not only the changes which fifty years of case law have wrought, but also to reflect the changes in the common law caused by the enactment of the Uniform Commercial Code.[52] Several changes from Restatement First illustrate the movement of contract law in the twentieth century.

1. Unconscionability. A provision on unconscionability appears in the Second Restatement.[53] The doctrine of unconscionability is emerging as a doctrine not confined to the sale of goods cases, but equally applicable to the common law generally in which it had already had a modest beginning[54] and in which it had played a major role in the availability of equitable remedies.[55]

2. Good Faith. Another new section in the Second Restatement, also influenced by the Uniform Commercial Code, specifies good faith in contract performance and enforcement.[56] It seems strange that, in a developed legal system like the common law of contracts, good faith was so slow to become a part of contract performance. Nevertheless, there were several reasons for this slow development. Bad faith was policed by fraud and duress in the bargaining process. Once the bargain on the contract was made, implied good faith in performance could be defeated by express provisions in the contract itself. If the contract expressly stated that someone could do something lawful in itself, then the person was allowed to

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48. UNIFORM LAW ON THE FORMATION OF CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS art. 7 (1964), 3 INT'L LEG. MATERIALS 864 (1964); United Nations Convention on the Uniform Law for International Sales art. 19 (1980), 19 INT'L LEG. MATERIALS 671 (1980). For a comparison of art. 19 with U.C.C. § 2-207, see J. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 165-70 (1982).

49. 1 ONTARIO LAW REFORM COMM'N, REPORT ON SALE OF GOODS, 81-86 (1979).

50. Vienna Convention on the Law of Treaties arts. 17-23 (1969), 8 INT'L LEG. MATERIALS 679 (1969).

51. Murray, *Intention Over Terms: An Exploration of U.C.C. § 2-207 and New Section 60, Restatement of Contracts*, 37 FORD. L. REV. 317 (1969).

52. *See* Farnsworth, *Ingredients in the Redaction of the Restatement (Second) of Contracts*, 81 COLUM. L. REV. 1 (1981).

53. RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981).

54. *See* Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965) and cases collected in official comment to U.C.C. § 2-302 (1958).

55. RESTATEMENT OF CONTRACTS § 367 (1932); *see also supra* text accompanying note 42.

56. RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981); UNIFORM COMMERCIAL CODE § 1-203 (1958).

do it. If the individual had the express power to terminate the contract without fault, then he could terminate it without fault.[57] No implied rule existed that he must terminate only in good faith because the express term negated such an implication. Now, the exercise of the termination right could be policed either by good faith or through the doctrine of unconscionability.[58]

Another reason for this slow development of a general rule of good faith was the existence of specific rules throughout First Restatement that tended, standing alone, to exemplify good faith. For example, an owner could not fail to pay a contractor if the architect failed to exercise an honest judgment or was in collusion with the owner.[59] Nor could a buyer reject goods when his dissatisfaction was with the bargain and not with the goods.[60] Now, according to the Second Restatement, the objector would not be performing in good faith.[61]

3. Modification of ongoing contracts. A third modification narrowed again, as did Restatement First, the role that consideration plays as a basis for the enforcement of promises. The Uniform Commercial Code permits the modification without consideration of an ongoing contract because of the way in which businessmen operate.[62] As unforeseen events begin to occur during a contract's performance, it would not be unusual for one businessman to seek and obtain modification of his obligation or of his right without granting a reciprocal modification to the other. Under the common law rules of contract, such an obtained promise to modify would not be enforceable because consideration was not given for it.

This common law rule is the pre-existing duty rule,[63] which performs a valuable function because it inhibits the reaping of the fruits of economic duress applied during the performance of a contract. One person may have no reason to make such a modification promise if he were not economically threatened in some way by the other party. As an example, a contractor may threaten to quit unless his price is raised. Quitting may be extremely inconvenient to the owner at the moment, and he, therefore may agree to raise the price. These

57. Bushwick-Decatur Motors, Inc. v. Ford Motor Co., 116 F.2d 675 (2d Cir. 1940).

58. For the distinction between unconscionability and good faith, see Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369, 371 n.14 (1980).

59. RESTATEMENT OF CONTRACTS § 303 (1932).

60. RESTATEMENT OF CONTRACTS § 265 comment a, illus. 1 (1932).

61. RESTATEMENT (SECOND) OF CONTRACTS §§ 205, 228 comment a, illus. 2 (1981).

62. UNIFORM COMMERCIAL CODE § 2-209(1) (1958).

63. RESTATEMENT OF CONTRACTS § 76(a) (1932); RESTATEMENT (SECOND) OF TORTS § 73 (1981).

modified promises were not enforced at common law.[64] The problem with the common law, however, was that it would not enforce any modification without consideration, whether the modification was in good faith or was coerced. The rule was nondiscriminating.[65]

The Uniform Commercial Code laid to rest the pre-existing duty rule by dispensing with the need for consideration in the modification of ongoing contracts.[66] The U.C.C. rule was just as nondiscriminating as the First Restatement rule. Thus, there are some modifications that should be enforced and others that should not be enforced because they were elicited through some form of duress.[67] The Uniform Commercial Code tempers its blanket approval for all contract modifications with its requirement of good faith in contract performance.[68] Therefore, even though a change always can be made without consideration, that change will not be enforced unless it is made in good faith.

The Second Restatement has provided for the enforcement of contract changes made without consideration in cases in which the change is reasonable and is caused by circumstances that were unanticipated at the time the contract was formed.[69] Thus rule is not as broad as section 2-209(1) of the Uniform Commercial Code but is as liberal a rule as the case law would permit.

4. Demand for assurances of performance. Another change in the Restatement, influenced by the Uniform Commercial Code, is the right of one party to a contract, when he feels that the other party may not perform, to ask for assurances of future performance. If such assurances are not forthcoming, then the party who is insecure may withhold his performance.[70] Caution, however, must be exercised in utilizing this right. The person's insecurity must be objectively reasonable *and* the assurances he requests must be reasonable.[71] If they are not, and he couples his request with a threat not to perform the contract unless such assurances are given, then he himself is a contract breacher.[72]

At common law, before the Uniform Commercial Code, such requests for assurances were only permitted when the other party to

64. Alaska Packers Ass'n v. Domenico, 117 F.2d 99 (9th Cir. 1902).

65. *See* Hillman, *Contract Modification Under the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 680 (1982).

66. UNIFORM COMMERCIAL CODE § 2-209(1) (1958).

67. *See* Hillman, *A Study of U.C.C. Methodology: Contract Modification Under Article Two*, 59 N.C.L. REV. 335 (1981).

68. UNIFORM COMMERCIAL CODE § 1-203 (1958).

69. RESTATEMENT (SECOND) OF CONTRACTS § 89 (1981).

70. *Id.* § 257; UNIFORM COMMERCIAL CODE § 2-609 (1958).

71. UNIFORM COMMERCIAL CODE § 2-609 comment 4 (1958).

72. *See* Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co., 532 F.2d 572 (7th Cir. 1976).

the contract was insolvent.[73] Presently, under the Uniform Commercial Code, requests for assurances are permitted in any circumstance, even requests for assurances of performance when the person requesting the assurance feels insecure because of the other party's past failure to perform an entirely different contract.[74] The Second Restatement, following the U.C.C., has broadened the rule of the First Restatement to permit the request for assurances in situations other than insolvency.[75] The case law, however, does not support this broad rule outside the sale of goods. It will be interesting to see if the case law will develop along lines similar to the U.C.C., as the Restatement Second urges.

5. Disputed debts paid by check. If a debtor disagrees with his creditor about an amount owed, then the debtor could send a check containing a phrase like "payment in full for material ordered from creditor." If the creditor, the recipient of the check, saw the notation on the check and went ahead and cashed it, then the debt was regarded as paid in full under the common law. The debtor made an offer to settle on the check, which offer was accepted by the creditor when he cashed the check.[76] The only thing the creditor could do to avoid this result was to return the check. He was in the embarrassing position of accepting now as full payment what he considered to be partial payment or taking nothing now.

Cases interpreting the U.C.C. "muddied the waters" of this rule by permitting the creditor to cash the check if he writes on it "all rights reserved," thereby allowing him to reject the offer of the debtor and still cash the check.[77] These cases are flawed in logic because a person cannot create a right by reserving a right, and the creditor had no right to the check of the debtor unless he accepted it on the terms in which it was offered.

In nonsale of goods cases, the Second Restatement rejects the U.C.C. case law interpretation and reiterates the fifty year-old principle of the First Restatement.[78] Merely writing a preservation of rights on the check and cashing it is not sufficient to create a right to the check. The offer of the debtor to settle must either be accepted or rejected. This common law theory is sound contract law. The the-

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73. RESTATEMENT OF CONTRACTS § 287 (1932).

74. UNIFORM COMMERCIAL CODE § 2-609 comment 3 (1958) ("[A] ground for insecurity need not arise from or be directly related to the contract in question.") *See also* Toppert v. Bunge Corp., 60 Ill. App. 3d 607, 377 N.E.2d 324 (1978).

75. RESTATEMENT (SECOND) OF CONTRACTS § 251 (1981).

76. RESTATEMENT OF CONTRACTS § 420 (1932).

77. UNIFORM COMMERCIAL CODE § 1-207 (1958); *see also* R. SUMMERS & J. WHITE, THE UNIFORM COMMERCIAL CODE §§ 13-21 (1972).

78. RESTATEMENT (SECOND) OF CONTRACTS § 281, illus. 6 and Reporter's Note to comment d (1982).

ory underlying the U.C.C. interpretation is not clear because there is nothing in the comments to the U.C.C. or in its negotiation and drafting which even contemplated such a result.[79]

6. Rights of defaulting plaintiffs. The First Restatement, besides being an innovator in third party beneficiaries and in estoppel, also established law regarding the rights of defaulting plaintiffs. What right, the early courts asked, does a contract breacher have to sue his victim? In a leading New York case, the court said that it is ill doctrine which would permit a substantial contract breacher to stand before the court as plaintiff and sue the victim of his breach.[80] The law, however, has not been as severe on the breacher, as exemplified by Restatement First[81] and by subsequent cases.[82] The contract breacher is viewed not to be suing on the contract, but instead to be suing for the value of any benefit he may have conferred upon his victim, less any damage that he has done to his victim by his breach. The defaulter will receive either the benefit he conferred or the contract price minus the damages he inflicted, whichever is less.[83] The First Restatement had an exception to this right of the contract breacher; a willful breacher had no such standing.[84]

This exception was not repeated in the Second Restatement.[85] The drafters, following the U.S.C.,[86] approached the willful breacher from the standpoint of good faith in the performance and execution of the contract. This lack of good faith is used more to determine the substantial nature of the breach,[87] than to prevent the breacher from suing for the benefit he has conferred on the other party before his breach.

7. Estoppel. Restatement Second further developed the law of estoppel.[88] It permits estoppel to operate even if there has not been substantial reliance. The Second Restatement also permits estoppel

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79. *See* Hawland, *The Effect of U.C.C. § 1-207 on the Doctrine of Accord and Satisfaction by Conditional Check*, 74 COM. L. J. 329, 331 (1969), in which the author discusses the failure of the official comments to U.C.C. § 1-207 to include reference to any change in existing law, thus suggesting a strong argument for the proposition that the drafters did not intend any change through the application of § 1-207 to a conditional check.

80. Lawrence v. Miller, 86 N.Y. 131 (1881).

81. RESTATEMENT OF CONTRACTS § 357 (1932).

82. *See, e.g.*, Kirkland v. Archbold, 68 Ohio Law Abstract 481, 113 N.E.2d 496 (Ct. App. 1953).

83. *See* RESTATEMENT OF CONTRACTS § 357, illus. 3 (1932).

84. *Id.* § 357(a)(a) comment e; *see also* Litel v. Marsh, 33 Wash. 2d 441, 206 P.2d 300 (1949), in which the court refused to allow recovery for a plaintiff guilty of a willful, persistent and material breach of contract.

85. RESTATEMENT (SECOND) OF CONTRACTS § 374 (1981).

86. UNIFORM COMMERCIAL CODE § 2-718(2) (1958).

87. RESTATEMENT (SECOND) OF CONTRACTS § 241(e) (1981).

88. *Id.* § 90; *see* RESTATEMENT OF CONTRACTS § 90 (1932) and *supra* text accompanying notes 7, 8, 9 for the Restatement's first formulation of promissory estoppel.

to operate for the benefit of third parties and in cases in which the promise is not gratuitous, like in situations when the offeror is looking forward to an acceptance that is yet to come.[89] The latter situation normally would occur if the offeree must do certain things before he is in a position to accept.

A common example of this situation is a construction contract of any magnitude in which the owner of a building, the general contractor and a subcontractor are involved. The general contractor must get offers from his subcontractors before he knows what type of offer he will make to the owner. He normally will not accept the offers of the subcontractors until his offer to the owner has been accepted. Once the owner accepts his offer, the general contractor is bound to the contract at a price based on the offers of the subcontractors. If a certain subcontractor withdraws his offer before the general contractor can accept the offers of all the subcontractors, then the particular subcontractor should be estopped from doing so. The subcontractor knew that the general contractor had to rely on his offer before the general contractor was in a position to accept it.[90]

One commentator has observed that the general spread of estoppel throughout the law of contracts eventually will cause its death.[91] Contract law is based on expectation. Estoppel is based on reliance. Reliance will undo many rules, like the requirement that some contracts be in writing, that an unaccepted offer may be revoked and that consideration is necessary for enforcement of a promise. Contract law eventually will look more like the law of torts with the remedy based on the damage done by an unkept promise, rather than on recompense for expectations aroused by the promise. These consequences, of course, are speculations at this time. Whether estoppel will be like the proverbial black hole in space and absorb everything around it must await the observations of contract writers in the next century. Estoppel clearly will modify, but will not necessarily replace, other more basic notions of contract law.[92]

III. Conclusion

Contract law in this century has been subject to a codification

89. RESTATEMENT (SECOND) OF CONTRACTS § 87(2) (1981).

90. *See* Drennan v. Star Paving Co., 51 Cal. 2d 409, 333 P.2d 757 (1958), an example of this rule in operation. Section 87(2) of the Second Restatement was drafted with this case in mind.

91. G. GILMORE, THE DEATH OF CONTRACT (1974).

92. *See* Knapp, *Reliance in the Revised Restatement: The Proliferation of Promissory Estoppel*, 81 COLUM. L. REV. 52, 78 (1981). "Like two other grand principles articulated in the U.C.C. and adopted by the drafters of the Restatement—'good faith' and 'unconscionability'—'promissory estoppel' states a principle of abstract justice capable of application in an infinite variety of factual situations."

or restatement, as have other areas of the common law. Early in this century, there was a sense of "arriving" at certain clear perceptions of the law. The same thought process took place in international law. The law had developed to a point at which it could be categorized, better known, less uncertain. Before World War II, this codification or restatement appeared to have been accomplished in contracts.

In the latter part of this century, the reverse has taken place. The law of contracts is resisting categorization of the applications of general rules, as evidenced by a reading of the Second Restatement. The precision and clarity of many of the 385 sections of Restatement Second compare unfavorably with the 609 sections of the First Restatement. More general rules have been formulated, and their application to certain situations is less clear.

The twentieth century process most likely will repeat itself in the twenty-first century. Again there will be, first, the effort to restate and then the resistance of contract law to restatement. Again courts and commentators will break the molds of precise legal rules and thus contribute to the continuing adjustment of contract law to new conditions and to the removal of the basic principles which underlie this ancient and useful field of law.